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No. 77-125

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1977

GETTY OIL COMPANY,

Appellant,

VERSUS

OKLAHOMA TAX COMMISSION

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The Appellee moves the court to dismiss the appeal herein for the reasons that it does not present a substantial federal question, that the federal question sought to be reviewed was neither timely nor properly raised, that the federal question was not expressly passed upon, and the decision of the Supreme Court of the State of Oklahoma is clearly correct and no conflict of decisions exists.

I.

CASE

A. THE STATUTE AND OPINION BELOW

This appeal raises the question of the validity of certain provisions of the Oklahoma "Income Tax Act", Title 68 Okla. Stat. 1971, Secs. 2351 et seq., specifically Title 68 Okla. Stat. 1971, Sec. 2358 (A) (3) (d), and the interpretation thereof by the Supreme Court of the State of Oklahoma. That interpretation and opinion of the Supreme Court of the State of Oklahoma is reported as *Getty Oil Company v. Oklahoma Tax Commission*, Okl., 563 P. 2d 627 (1977). See Appendix A to Appellant's "Jurisdictional Statement".

B. JURISDICTION

In addition to the facts set forth in Getty Oil Company's statement on "Jurisdiction", Appellant's "Jurisdictional Statement", at page 2 thereof, it must be noted that the Supreme Court of the State of Oklahoma did, by "Supplemental Opinion on Rehearing", Appellant's "Appendix A-8", allow the Appellant's "Request for Remittitur of Interest Paid". Pursuant to the "Mandate" of the Supreme Court of the State of Oklahoma, the Oklahoma Tax Commission (Tax Commission) remitted the interest paid by Getty Oil Company to its attorneys, counsel herein, which remittitur was refused.

C. QUESTION PRESENTED

Is there a denial of equal protection of the laws under the Fourteenth Amendment to the United States Constitution by an Oklahoma statute, which applies, on its face, to all taxpayers, and whose only function is to limit, by apportionment and

allocation, the amount of net operating loss carryover deduction, which deduction is required to be reflected on the taxpayer's federal income tax return, to that portion attributable to activities carried on in the State of Oklahoma by the taxpayer.

D. STATEMENT

Getty Oil Company (Getty) is a Delaware Corporation, qualified to do business in the State of Oklahoma, primarily engaged, at the times in question, in "oil production" in the United States and other countries.

In calculating its 1971 Oklahoma "taxable income" for purposes of completion, filing and payment of its Oklahoma income tax liability, Getty claimed a "deduction" on its 1971 "Oklahoma Corporation Income Tax Return" for net operating losses sustained by it in the five (5) years prior to the 1971 Oklahoma income tax year, 1966 through 1970, inclusive.

These net operating loss carryover deductions were not claimed prior to 1971, because, prior to 1971, the State of Oklahoma did not allow any taxpayer to claim, nor was any taxpayer allowed, a deduction for net operating losses from a previous year or years, Title 68 Okla. Stat. 1961, Secs. 2301 et seq., now repealed.

In each of the Oklahoma income tax years 1966 through 1970, inclusive, Getty sustained, for Oklahoma income tax purposes, operating losses over and above its operating profits in Oklahoma. In each of these years, Getty's operating losses, for federal income tax purposes, were absorbed at the federal level by its operating gains in states other than Oklahoma. Thus, Getty did not suffer a net operating loss, for federal income tax purposes, for any of the years 1966 through 1970, inclusive. It did not have a federal net operating loss to carry over as a net

operating loss deduction on any of its federal income tax returns for any tax year involved herein.

In 1971, Oklahoma changed its income reporting system from a system similar to that of the federal income reporting system to a system whereby Oklahoma incorporated as its base or beginning point, for Oklahoma income tax purposes, federal "taxable income" or "adjusted gross income", if necessary or required by Oklahoma laws. Adjustments thereto were provided by law so as to arrive at "Oklahoma taxable income", upon which there is levied and collected the Oklahoma income tax.

Those adjustments are enumerated in the questioned statute, Sec. 2358 of Title 68 Okla. Stat. 1971. One of those adjustments required in order to arrive at Oklahoma taxable income, Sec. 2358 (A) (3) (1), requires that all taxpayers should adjust their federal "taxable or adjusted gross income" to the state in which such activity, such as Getty's income from the production of oil, real and tangible personal property, to the situs of such property. As a result, Getty separately allocated to Oklahoma that portion of its federal net or "taxable income" derived from the production of oil from lands located in Oklahoma.

From this separately allocated portion of its 1971 federal taxable income, Getty then claimed a net operating loss carryover deduction for Oklahoma net operating losses sustained by it in the five previous income tax years. This deduction resulted in Getty having no Oklahoma "taxable income" for Oklahoma income tax purposes for the five previous income tax years. As in the previous five income tax years, Getty had no "Oklahoma Corporate Income Tax" liability.

Thereafter, the Income Tax Division of the Tax Commission reviewed Getty's 1971 Oklahoma "Corporation Income Tax Return". As a result of this review, Getty was denied the claimed "net operating loss carryover deduction". It was notified that since it did not have a net operating loss deduction reflected in those figures used by it in arriving at its 1971 federal "taxable income", that it would not be permitted an Oklahoma adjustment for a net operating loss carryover deduction against its 1971 Oklahoma taxable income.

Thus, Getty was assessed $58,000 in additional corporate income taxes for the 1971 income tax year. Getty duly protested this assessment, pursuant to Oklahoma law, and requested an oral hearing before the Tax Commission. An oral hearing was held before the Tax Commissioners. Both oral and documentary evidence was presented to the Tax Commissioners by representatives and legal counsel for the Income Tax Division of the Tax Commission and Getty. Thereafter, the Tax Commission issued its Order No. 62 195 denying Getty's "Protest" of the aforesaid assessment of additional "Oklahoma Corporation Income Taxes".

Prerequisite to its right to appeal, Getty paid under protest the assessed "Oklahoma Corporate Income Tax", together with interest due thereon. Getty also gave "Notice of Its Intention to Appeal" to the Supreme Court of the State of Oklahoma. Thereafter, Getty filed its "Petition in Error" with the Supreme Court of the State of Oklahoma, Appendix D to Appellant's "Jurisdictional Statement".

The Supreme Court of the State of Oklahoma found that the State of Oklahoma had not adopted all federally allowed deductions. They further found that Getty's 1971 federal taxable income return did not reflect any deduction for carryover

losses. (This has been agreed by the parties.) The Court concluded that the adjustment authorized by Title 68 Okla. Stat. 1971, Sec. 2358 (A) (3) (d) to this taxpayer's "taxable income" is directed to the situation where the loss carryover deduction claimed on the federal return included losses from activities in other states. If there is a loss carryover deduction allowed on a taxpayer's federal return, the net operating loss carryover deduction is allowed for Oklahoma income tax purposes, and the function of Subsection 2358 (A) (3) (d) is to limit that figure to that portion attributable to activities carried on in the State of Oklahoma. This, they concluded, was the required result, since "(i)t was not the intent of the Legislature to create a deduction by this provision, *but only* to limit one already reflected on the Federal return." *Getty Oil Company v. Oklahoma Tax Commission*, Okl., 563 P. 2d 627, at 630. (Emphasis added)

They further found that prior to 1971, the State of Oklahoma allowed no carryover loss deductions. However, by incorporating "federal taxable income" into Oklahoma's new "Income Tax Code", Oklahoma now permits carryover loss deductions, if such deductions are reflected in the amount shown on the federal income tax return as a net operating loss deduction utilized in arriving at federal "taxable income". This federally allowed figure is, however, subject to the limitation of Title 68 Okla. Stat. 1971, Sec. 2358 (A) (3) (d). The Court recognized that if the Legislature had intended to allow a carryover deduction in situations such as Getty's, they could have easily provided for such an adjustment. But they did not do so.

It is the position of the Tax Commission that one change resulting from 1971 in the Oklahoma's system of income taxation is that the Tax Commission no longer audits, in the

traditional sense, Oklahoma taxpayers' income tax returns. Rather, its function, under the new system of income taxation, is not to question the amount of the figures utilized in arriving at a taxpayer's federal "taxable income", but simply to take that figure of federal "taxable income", as reflected on a taxpayer's federal and Oklahoma income tax returns, verify their authenticity and correctness, and determine and insure that the taxpayer has properly adjusted and allocated its federal "taxable income" so as to properly compute the taxpayer's Oklahoma "taxable income". This method of Oklahoma income tax reporting was apparently adopted by the Legislature to simplify Oklahoma's system of income taxation and reporting. One benefit that has resulted from this change has been a reduction in the cost of administering the Oklahoma income tax law. The Tax Commission is no longer required to make and maintain records of "in depth" audits of taxpayers. For it no longer has to determine the correctness of each and every item utilized in determining the amount of a taxpayer's Oklahoma "taxable income".

If this Court adopts the arguments of Getty in this case, it will, conceivably, result in a taxpayer such as Getty being able to claim a net operating loss carryover deduction in Oklahoma, which the Tax Commission will not be able to verify or audit, because it is not reflected on the federal return.

This decision, if favorable to Getty, could result in the State of Oklahoma being forced, in future years, to accept figures not subject to audit. Further, if the Court declares the statute in question to be unconstitutional, Oklahoma would have no effective limitation upon the amount of a net operating loss carryover deduction that a taxpayer might claim.

Getty will argue that Oklahoma should use the Federal

Internal Revenue Code Section, Title 26 U.S. C.A., Secs. 172 et. seq. This would necessitate Oklahoma auditing, for state purposes, a federal return. Due to the state's and federal's divergent purposes, different results may be obtained.

Finally, the Supreme Court of the State of Oklahoma noted, relying entirely upon Oklahoma income tax cases, that:

> "Taxing statutes are frequently discriminatory, but for an income tax classification to be constitutional, all that is required is that the classification and apportionments be reasonable and be related to the object of the tax action. There is no discrimination in Oklahoma against a taxpayer solely because he, like Getty, is a non-resident. Had Getty been a resident of Oklahoma, the tax consequences would have been the same.
>
> "Getty's argument that tax is an indirect tax on income from sources outside Oklahome also fails. Although the tax may have a direct effect upon the total of Getty's income and thus an indirect effect upon his outside Oklahoma income, a state is not barred from levying an income tax upon income within its boundaries because of its indirect effect upon outside income." *(Getty Oil Company v. Oklahoma Tax Commission, Okla., 563 P. 2d 627, at 631).*

This is not an indirect tax on income from sources outside of Oklahoma; the statute merely limits the circumstances under which a net operating loss carryover deduction will be allowed.

II.

ARGUMENT

A. FEDERAL QUESTION WAS NOT PROPERLY RAISED

Only the constitutional issues raised in lower courts are before the Supreme Court on appeal, *Shelly v. Kraemer, Mich. & Mo.*, 334 U.S. 1.

At no time did Getty allege or state that it based its attack upon Title 68 Okla. Stat. 1971, Sec. 2358 (A) (3), in whole or in part, upon rights granted to it by the Fourteenth Amendment of the United States Constitution. It has stated that the statute would, if interpreted as the Tax Commission found it should be, "arbitrarily discriminate against it and therefore be unconstitutional and void", (Appendix D-3, Appellant's "Jurisdictional Statement"). It has also stated that denial of the benefit requested by Getty would "constitute unreasonable, arbitrary and capricious, and therefore, invalid action by the Oklahoma Tax Commission, (Appendix F-1, Appellant's "Jurisdictional Statement"). Finally, it asserted that:

> "5. The issue is of substantial public significance because the Appellee's interpretation of Section 2358 (A) (3) is unconstitutional in its application." (Appendix E-2, Appellant's "Jurisdictional Statement").

From the documents now before this Court, it appears Getty has not made a "timely and explicit" insistence, at any

point in the litigation of this case, that the questioned statute is repugnant to the United States Constitution, much less the Fourteenth Amendment to the United States Constitution. See *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U.S. 888; *Raley v. Ohio*, 360 U.S. 423; and *Jett Bros. Distilling Co. v. City of Carrollton*, 252 U.S. 1. It is certainly clear, from the "Opinion" of the Supreme Court of the State of Oklahoma, that it did not understand that the Fourteenth Amendment of the Federal Constitution was one of the bases for Getty's objection to the Statute. See *Saltonstall v. Saltonstall*, 276 U.S. 260.

Contrary to Getty's assertions, it is clear, from the documents before this Court, that it has not asserted before any tribunal of Oklahoma that the questioned statute was void because of conflict with the Federal Constitution, much less the Fourteenth Amendment to the United States Constitution, nor has it taken every opportunity, as it urges that it has, to assert that the questioned statute was null and void under the Federal or United States Constitution.

B. NO FEDERAL QUESTION WAS EXPRESSLY PASSED ON

At no point in the "Opinion" or "Supplemental Opinion on Rehearing" of the Supreme Court of the State of Oklahoma did that Court, speaking through Justice Doolin, mention any federal case or right guaranteed unto Getty by the Fourteenth Amendment to the United States Constitution. The Court did mention a case cited by Getty as supporting its interpretation of the Statute. This case, *Graham v. State Tax Commission*, 369 N.Y.S. 2d 863, did not mention any rights guaranteed to that taxpayer under the Fourteenth Amendment to

the United States Constitution. Nor was any federal case or any federal constitutional provision cited at any point by the Supreme Court of the State of Oklahoma as being in question. It relied entirely upon Oklahoma cases. In dealing with *Graham v. State Tax Commission*, 369 N.Y.S.2d 863, the Supreme Court of Oklahoma stated, in addition to what Getty has stated at page 4 of its "Jurisdictional Statement", that:

> "Here we deal with taxable income produced in Oklahoma by *any* taxpayer. The New York case dealt with difference in taxable income between *resident* and *non-resident* taxpayers." (Appendix A-7, Appellant's "Jurisdictional Statement").

The Supreme Court of the State of Oklahoma clearly, and without doubt, did not expressly pass upon any right guaranteed unto Getty by the Fourteenth Amendment to the United States Constitution.

In order to support an appeal to the United States Supreme Court from a decision of a state Supreme Court upholding state tax, a question of validity of a state tax statute must be either presented to a state court or decided by it, and it is not sufficient merely to attack tax levied under the statute or right to collect the tax or to show that validity of tax alone has been considered. Where a complaint in state court charged only that demand of a state for tax was illegal and in violation of certain constitutional provisions, and where a state Supreme Court considered only the validity of tax and not that of a statute, the record did not show that plaintiff presented for decision to a state Supreme Court any federal question as to validity of a state statute, and the United States Supreme Court

was without jurisdiction of appeal from judgment of a state Supreme Court. See *Wilson v. Cook*, 327 U.S. 474.

The Supreme Court of Oklahoma clearly relied upon its own case law in sustaining this assessment of Oklahoma income taxes.

C. THE FEDERAL QUESTION IS NOT SUBSTANTIAL AND THE DECISION IS CLEARLY CORRECT

The Oklahoma Tax Commission respectfully submits that the federal question presented in this case by Getty Oil Company is not substantial because the decision of the Supreme Court of the State of Oklahoma is so clearly correct as to foreclose the subject and leave no room for inference that the question sought to be raised can be the subject of further controversy before this Court. *Hagans v. Lavine*, 415 U.S. 528; *Newburyport Water Co. v. Newburyport*, 193 U.S. 561; and *McGilvra v. Ross*, 215 U.S. 70.

The taxpayer contends, in this case, that Oklahoma cannot apportion a federally "allowed" net operating loss carryover deduction without there being a denial of equal protection of the laws, because there exists no "reasonable basis" upon which it can be said that different treatment may be accorded Oklahoma taxpayers operating in Oklahoma and other states. This argument is not correct.

It is clear that the question statute does not, in law or in fact, discriminate between Oklahoma taxpayers in its apportionment of federal "taxable income" because of citizenship or residence. It is also clear from the statute that the apportionment and allocation of a net operating loss carryover deduction is not affected by whether or not a taxpayer is or is not a citizen or resident of Oklahoma. If a resident corporation or citizen of Oklahoma were in the same position as Getty, the same result would be obtained under the questioned statute and the same arguments could be made by that taxpayer, for the statute treats all equally. The questioned statute is totally nondiscriminatory in its effect upon suspect areas of classification, e.g., race, sex, religion, residence or citizenship.

Appellant points out in its "Jurisdictional Statement" that the questioned statute is not "fair" or "wise". This Court has repeatedly held that simply because a statute is "unfair", "creates hardships", or is even "oppressive", will not render it unconstitutional. *St. Louis, I.M. & S.R. Co. v. Taylor*, 210 U.S. 281; *Wickard v. Filburn*, 317 U.S. 111; *Magoun v. Illinois Trust and Sav. Bank*, 170 U.S. 283; and *Billings v. Illinois*, 188 U.S. 97. Nor does the lact of wisdom of a statute render it unconstitutional. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541; and *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483.

The taxpayer's citations of authority are not applicable to the instant case. Each of the Appellant's cited authorities is based upon a statute wherein the legislature of each state had created an exemption. This is not the case now before this Court. The cited cases are not applicable to this case because the Supreme Court of the State of Oklahoma specifically held that it was not the intent of the Legislature of the State of Oklahoma to create a deduction by the provisions of Section 2358(A) (3). Or, an exemption as the Appellant contends at this time. The Appellant's contention that Sec. 2358 (A) (3) created a deduction was rejected by the Supreme Court of the State of Oklahoma. The Supreme Court of the State of Oklahoma further held that the function of Sec. 2358(A) (3) (d) was to limit an already existing deduction of the taxpayer's federal income tax return. This Court must accept both of those findings by the Supreme Court of the State of Oklahoma, for it is clear that the Court will consider a state high court's interpretation of a questioned statute to be a part of the statute. See *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522.

The taxpayer did not have a federal net operating loss of a federal net operating loss carryover deduction during any of

the federal income tax years, 1966 - 1971, inclusive. Therefore, it was correctly denied an adjustment for a new operating loss carryover deduction of Oklahoma tax purposes.

In dealing with questions concerning the validity of a state tax law, this Court has often noted certain basic rules upon which it may rely to determine the constitutionality of a state tax statute.

While it is clear that the Fourteenth Amendment to the United States Constitution applies to each of the various states, it is also clear that the Fourteenth Amendment was not intended to force the states to accept an iron rule of equality. *Bell's Gap R.R. Co. v. Com. of Pennsylvania*, 134 U.S. 232. It has long been recognized by this Court that the various state Legislatures have a large area of discretion within which they may constitutionally formulate acceptable tax policies. *Madden v. Commonwealth of Kentucky*, 309 U.S. 83. In the area of taxation, even more so that other areas, state Legislatures are held to possess the greatest amount of freedom of classification in order to fit tax programs to local needs, goals and usages. See opinion of Mr. Justice Brandeis in *Louisiana Gas & Electric Co. v. Coleman*, 277 U.S. 32; and *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573. Since local legislative bodies enjoy a familiarity with local conditions which this Court does not enjoy, this Court's presumption of constitutionality is especially pertinent to the area of state taxation. Further this Court has long recognized that it should not, except only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against persons and classes, hold a state taxation statute unconstitutional, for it is clear that a state, in the exercise of its taxing power, is entitled to every possible presumption in its favor, and clear and demonstrated

usurpations of power will authorize this Court to interfere with the state's action. *Green v. Frazier*, 253 U.S. 233.

In dealing with state taxing statutes which apportion and allocate net income to the taxing state, this Court has required only that the apportionment should "fairly calculate" that portion of the taxpayer's income "reasonably attributable" to the taxing state. *Bass, Ratcliffe & Gretton, Ltd. v. State Tax Commission*, 266 U.S. 271; and *Butler Bros. v. McColgan*, 315 U.S. 501.

This taxpayer has not, in any manner or means, demonstrated that the questioned statute does not fairly apportion and allocate to Oklahoma that portion of its federal "taxable income" which is "reasonably attributable" to Oklahoma. This Court has often held that the happening of a "fortuitous event" will not provide sufficient grounds upon which it will hold that there has been a denial of equal protection of the laws under the Fourteenth Amendment to the United States Constitution. See *Illinois C.R. Co. v. Minnesota*, 309 U.S. 501, rehearing denied, 309 U.S. 695; *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 304 U.S. 588; and *Merchants' M. Nat. Bank v. Pennsylvania*, 167 U.S. 461. Taxpayer indicates at page 16 of its "Jurisdictional Statement", that this was a "fortuitous event".

It should be made clear that this taxpayer does not contend that there exists discrimination in the treatment of other taxpayers within the alleged class. Its sole contention is that its class is being discriminated against. The questioned statute clearly and unequivocably does not discriminate within a class.

Getty's sole contention in this case is that the alleged

class distinction is arbitrary and unreasonable and that no justifiable basis can be given for such a distinction. There are several bases upon which this Court should hold that the questioned statute's alleged classification is constitutional.

One of those bases is that the Legislature of the State of Oklahoma could have based this classification upon the "ability of a class to pay". It seems obvious that a taxpayer such as Getty, who is able to absorb sizeable net operating losses within Oklahoma and still show a net operating gain has a greater ability to pay than does a taxpayer who has a federal net operating loss. Such a basis for distinction was recognized by this Court in the federal income tax case of *Kellems v. Commissioner*, 58 T.C. 566, affirmed 474 F.2d 1399, certiorari denied, 414 U.S. 831. In that case, there was presented, among others, the question of whether or not there was a denial of equal protection of the laws under the United States Constitution, because of the lack of the benefit of income splitting between single and married federal income taxpayers. That Court found that there was no denial of the taxpayer's Constitutional rights under the Fifth, Ninth, Fourteenth and Sixteenth Amendments to the United States Constitution. The Court further found that:

> "*** Congress was within its constitutional role since it is conceivable Congress believed that married persons generally have greater financial burdens that single persons. The recognition of such greater burdens is consonant with taxation based on the *ability to pay*, which has long been an important objective of the income tax scheme." (Emphasis added) (58 T.C. 566, at page 567)

That case is directly analogous to this case, when one

realizes that the Oklahoma "Income Tax Code", Title 68 Okla. Stat. 1971, Secs. 2351 et seq., is based upon and apportions and allocates federal "taxable income" to determine the amount of a taxpayer's Oklahoma "taxable income".

Certainly it would be reasonable for this Court to assume that the legislative basis for this reasonable classification was the Oklahoma Legislature's reasonable belief that a taxpayer who is able to suffer an Oklahoma net operating loss and still show a federal net operating gain, as Getty did for at least the five years preceding 1971, was possessed a greater ability to pay than a taxpayer who had suffered both Oklahoma and federal net operating losses.

It is also reasonable to assume that the Legislature of the State of Oklahoma felt that this was a reasonable method of allocating this federal deduction to Oklahoma taxpayers, in light of the "spirit" of the federal net operating loss carryover deduction law, Title 26 U.S.C., Sec. 172 et seq. In *Lisbon Shops v. Koehler*,353 U.S. 382, this Court, in discussing the federal net operating loss carryover deduction, held that:

> "Those provisions were enacted to ameliorate the unduly drastic consequences of taxing income on strictly an annual basis. They were designed to permit a taxpayer to set off its lean years against its lush years, and to stike something like an average taxable income computed over a period longer than one year." See also *Lewyt v. Commissioner*, 349 U.S. 237, 243-244; *Manning v. Seeley Tube & Box Co.*, 338 U.S. 561, 566-567; and *Stanton Brewery, Inc. v. Commissioner*, 176 F.2d 573,574.

It is reasonable to assume that it was a similar motive that caused the Legislature of the State of Oklahoma to allow an adjustment for a net operating loss carryover deduction. Prior to 1971, Oklahoma did not allow any loss carryover deductions. The legislature could not allow a taxpayer to allocate the full amount of his multi-state federal net operating loss to Oklahoma. Oklahoma should only accept its fair portion of the federal net operating loss carryover deduction.

The Tax Commission's primary function in the administration of the Oklahoma Income Tax Code is to insure that Oklahoma taxpayers properly adjust and allocate their federal "taxable income" to Oklahoma. The Tax Commission does not determine the taxability or deductibility of any item appearing on a taxpayer's return. The Tax Commission does not question the authenticity or amount of an income item or deduction. It determines, under the applicable statutes, whether or not a taxpayer has properly adjusted and allocated to Oklahoma those figures finally allowed to it by the Internal Revenue Service. Thus, the Oklahoma Tax Commission accepts as correct the figures finally allowed by the Internal Revenue Service. This procedure simplified income tax reporting in Oklahoma.

Thus, the Legislature of the State of Oklahoma felt that it would be administratively convenient to require a federal net operating loss carryover deduction on the federal return and an Oklahoma net operating loss carryover deduction in the same loss year before any taxpayer would be permitted to apportion allocate Oklahoma's proportion of the federal net operating loss carryover deduction. Administratively, it would be more convenient to apportion and allocate a proportion of an already existing deduction than it would be to determine and audit the amount of deduction. Taxpayer argues that a deduction was

created by the legislature rather than a limitation being placed on the federal deduction. This position is inconsistent with the legislature's intent to simplify Oklahoma's tax reporting and auditing system.

In *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, Mr. Justice Jackson, in upholding a classification based upon source of income, that:

> "Equal protection does not require identity of treatment. It only requires that classification rest on real and not feighed differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary. Cf. Dominion Hotel, Inc. v. State of Arizona, 249 U.S. 265, 39 S. Ct. 273, 63 L.Ed. 597; Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412, 57 S. Ct. 772, 81 L. Ed. 1193; New York Rapid Transit Corp. v. City of New York, 303 U.S. 573, 58 S. Ct. 721, 82 L.Ed. 1024; Skinner v. State of Oklahoma ex rel Williamson, 316 U.S. 535, 62 S. Ct. 1110, 86 L.Ed. 1655. 'In its discretion it may tax all, or it may tax one or some, taking care to accord to all *in the same class* equality of rights.' Southwestern Oil Co. v. State of Texas, 217 U.S. 114, 121, 30 S. Ct. 496, 498, 54 L.Ed. 688. It may even tax wholesalers of specified articles on account

> on their occupation without exacting a similar tax on the occupations of wholesale dealers in other articles. Our disapproval of the wisdom or fairness of so doing is not a ground for interference. Ibid. 'When a state Legislature acts within the scope of its authority it is responsible to the people, and their right to change the agents to whom they have intrusted the power is ordinarily deemed a sufficient check upon its abuse. When the constituted authority of the state undertakes to exert the taxing power, and the question of the validity of its action is brought before this court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action.' Green v. Frazier, 253 U.S. 233, 239, 40 S.Ct. 499,501, 64 L.Ed. 878." (Emphasis Courts) 347 U.S. 231, 237-238.

The classification drawn by the Legislature of the State of Oklahoma is not based upon any feigned differences; it based its classification upon real differences in the ability to pay of Oklahoma taxpayers. It drew the line equally and without discrimination as to residency or citizenship. The classification is determined not by subjective standards, but upon the real criteria of whether or not an Oklahoma taxpayer did or did not have a federal net operating loss carryover deduction. This was neight arbitrary nor was it capricious. It benefits those who are in greatest need of assistance. It is in full compliance with predecisions of this Court.

For all of the above and foregoing reasons, the Tax Commission respectfully urges this Court to dismiss this case for the reason that this case does not present a substantial federal question because the decision of the Supreme Court of the State of Oklahoma is clearly correct and in accord with previous decisions of this Court.

CONCLUSION

Wherefore, Appellee respectfully submits that this Court should dismiss the appeal herein for the reasons that it does not present a substantial federal question, that the federal question sought to be reviewed was neither timely nor properly raised, that the federal question was not expressly passed upon, and the decision of the Supreme Court of the State of Oklahoma is clearly correct and no conflict of decisions exists.

Respectfully submitted,

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